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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SIKIRU HAMZAT,

Plaintiff and Appellant,

v.

SANDRA RHOTEN et al.,

Defendants and Respondents.

G056233

(Super. Ct. No. 30-2016-00877738)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Martha K. Gooding, Judge. Affirmed.

Sikiru Hamzat, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Danielle F. O'Bannon, Senior Assistant Attorney General, Richard J. Rojo and Mark A. Brown, Deputy Attorneys General, for Defendants and Respondents.

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In this civil rights action under section 1983 of title 42 of the United States Code (section 1983), plaintiff Sikiru Hamzat, a former student of California State University Fullerton (CSUF), alleged that CSUF administrators, defendants Kathy Spofford and Sandra Rhoten, violated his First Amendment rights. Hamzat now appeals from a summary judgment entered in favor of Spofford and Rhoten. The undisputed evidence presented at the summary judgment hearing showed that neither Spofford nor Rhoten did anything whatsoever to violate Hamzat's First Amendment rights. Accordingly, we affirm the judgment.

## FACTS

### *The Third Amended Complaint*

The allegations against defendants Spofford and Rhoten in Hamzat's operative third amended complaint (TAC) are somewhat cryptic.<sup>1</sup> As to the respondents in this appeal, Spofford and Rhoten, Hamzat alleges he was disciplined because he made a statement to "Spofford's office (health department)" that he "was being treated unfairly because of the color of [his] skin, and that if [he had] to pay the \$20 they'll pay me back." Dean of Students Rhoten conducted a disciplinary hearing, which Hamzat did not attend, in which she alleged that his statement to Spofford's office violated the student code of conduct. The "hearing officers" and the dean's office made a recommendation to CSUF President Garcia who issued a final decision pursuant to executive order 1098 on student conduct procedures. Hamzat "made it clear to" Garcia and other school officials

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<sup>1</sup>

The TAC named the following persons as defendants: Timothy White, Chancellor, California State University; Mildred Garcia, President, CSUF; Sandra Rhoten, Associate Dean of Students, CSUF; Kathy Spofford, Student Wellness Executive Director, CSUF; and "California Department of Justice a state agency" (defendant-intervenor).

that he would “not abide by the unfair sanction levied.” Subsequently, he was expelled from school.

Hamzat further alleged that his statements were political expression protected by the First Amendment, “Section 2(a) of Article I of the California Constitution, and Section 48907 of the Education Code.” He further alleged his conversation with Spofford’s office did not constitute a threat or a disruptive discussion.

The TAC sought judgment pursuant to section 1983 against defendants for violating his First Amendment rights. Hamzat sought, inter alia, an order requiring defendants to pay him back his tuition fees of around \$19,000, costs, and attorney fees (if he hired an attorney).

#### *Spofford’s and Rhoten’s Motion for Summary Judgment*

Spofford and Rhoten filed a combined motion for summary judgment.<sup>2</sup> In support of the motion, the declarations of Spofford and Rhoten added detail to the sparse allegations of the TAC.

#### *Spofford’s Declaration*

Spofford declared that at the time of the incident giving rise to this litigation, she was the “Student Wellness Executive Director” at CSUF and “oversaw Health Services, Counseling and Psychological Services, and Disability Support Services for students” at CSUF. On August 16, 2016, Spofford received a telephone call from the acting director of health services for that day relating that a health services employee, Sylvia Davalos had reported that Hamzat “had used inappropriate language in a telephone call during which he was complaining about a \$20 fee being charged to his account because he failed to cancel a medical appointment.” Spofford advised the acting director

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<sup>2</sup>

Garcia also moved for summary judgment, but less than a month later, the court sustained Garcia’s demurrer to the TAC without leave to amend.

that Davalos should file a complaint with “Student Conduct.” Davalos did file her complaint, alleging that Hamzat “was extremely irate, used profanity, screamed obscenities and stated ‘this is why people go crazy, and you will see what’s going to happen.’” Spofford’s declaration explained that during the time she was the executive director, “Health Services had a policy that a hold would be . . . placed on a student’s transcripts and academic records if there was an outstanding balance,” but added, “I did not direct that a hold be placed on Mr. Hamzat’s transcripts and academic records.” Spofford also stated that “As Executive Director, I was not responsible for imposing any discipline or adverse action against any student at [CSUF] for violation of the student conduct code. I did not impose any sanction or adverse action, or recommend any sanction or adverse action, be taken against Mr. Hamzat for violation of the student conduct code.”

Exhibit A to Spofford’s declaration is a confidential risk management incident report for CSUF’s student health and counseling services. It reports an incident on August 16, 2016 involving student Hamzat and staff member Davalos. Detective Hollyfield of the university police was notified. The incident is described by Davalos as follows: “I took a phone call that was transferred to me by Mary trying to assist with explaining why he had a fee on his account. He was extremely irate and using profanity, I let him vent in hopes he would cool off and asked him to please stop using inappropriate language so I can further assist him. After I explained the policy he continued to use profanity and then stated ‘this is why people go crazy, and you will see what’s going to happen.’ I asked him if he was [threatening] me, he continued to scream obscenities and I stated this conversation is over I can no longer assist him until he calms down. [¶] Approx. 2:27 he called back and identified himself and stated ‘if he has to pay the \$20.00 fee tha[n] trust me you will be paying for this[.]’ Then he hung up. [¶] At 2:52 Pt called back and continued with his profanity. His call was transferred to the cashier as he requested.”

### Rhoten's Declaration

Rhoten's declaration filled in the details of her role in the incident. At the time of the incident she was the associate dean of student conduct at CSUF. Her "duties included investigating and adjudicating alleged student conduct code violations . . . ." She recounted that her office received the Davalos complaint which alleged that on August 16, 2016, Hamzat had "violated the university student conduct code set forth at Title 5, California Code of Regulations, Section 41301 in communications with staff members at the Student Health Center located on [CSUF] campus." Pursuant to the procedures set forth in California state university executive order 1098,<sup>3</sup> Rhoten notified Hamzat of the allegations and requested that he schedule a meeting with her by September 9, 2016 "to discuss the complaint and to review the University Student Conduct Code." She also advised him he could bring an advisor with him, but the advisor could not speak on his behalf, and could not be a licensed attorney. Rhoten explained that if Hamzat did not schedule a meeting with her by September 9, a hearing would be scheduled pursuant to executive order 1098 and a hold would be placed on his academic records.<sup>4</sup>

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<sup>3</sup>

Inter alia, when a violation of the student conduct code is alleged, executive order 1098 mandates written notice to the student of the allegations against him; an opportunity for the student to have a conference with the student conduct administrator or designee; and a hearing if the matter is not resolved at the conference. The notice of conference must include, inter alia, "[n]otification of the Student's right to be accompanied at the conference by an Advisor and the Campus policy regarding use of attorneys . . . ." Executive order 1098 specifies the conference may not be recorded.

<sup>4</sup>

Executive order 1098, article V, section D, provides: "The University may place an administrative hold on registration transactions and release of records and transcripts of a Student who has been sent written notice of a pending investigation or disciplinary case concerning that Student, and may withhold awarding a degree otherwise earned *until completion of the process set forth herein*, including the completion of all sanctions imposed." (Italics added.)

Hamzat responded by e-mail to Rhoten's invitation to schedule a meeting by stating he did not trust Rhoten enough to attend the meeting without an attorney. Hamzat offered three alternatives: (1) allow his attorney to be present; (2) record the meeting; or (3) conduct the discussion by video conference or e-mail. If Rhoten did not agree to his conditions, she could "skip the meeting and just schedule the office hearing." Pursuant to executive order 1098, Hamzat's failure to meet with Rhoten resulted in a hold being "placed on his records prohibiting him from performing any registration transactions or releasing his records or transcripts."

#### Hamzat's Opposition

Hamzat's opposition to the summary judgment motion alleged the "case involved a black student who made a political statement during a conversation with school staff." He asserted a triable issue of fact existed as to his section 1983 cause of action because "Rhoten accused [him] of commit[ing] a crime on campus" and denied his request to have an attorney present at the hearing.

Hamzat's declaration in support of his opposition denied making the statements attributed to him in the Davalos complaint. Instead, Hamzat declared he said to Davalos: "I was been [*sic*] treated unfairly because I am black and if I had to pay the \$20 the school will pay me back. A friend of mine who is white had the same problem and how come you guys never put a hold on his record. I called your supervisor Kathy the other day and I was told to call back today, that the hold would be removed but now you're telling me that I have to pay the \$20 this is freaking stupid. When it comes to black people you guys always treat us differently. You're freaking lying right now because I did show up for my lab result that day, you can check the CCTV cameras. You saw me that day and asked me to come back, which I declined. You're going to charge me \$40 because I didn't show up twice in the same day but as a courtesy, you've waived \$20 and I'll have to pay \$20. Who does that? You people are freaking racist, If I'm

white would you put a hold on his record? We experienced same stuff on the street and now same on campus, this is why black people get mad. Are you kidding me right now?

### *Court's Ruling*

The court granted Spofford's and Roten's summary judgment motion. Judgment was entered against Hamzat on April 23, 2018.

## DISCUSSION

Hamzat challenges the court's grant of defendant's summary judgment motion on both procedural and substantive grounds.

### *Hamzat's Procedural Challenges Are Without Merit*

First, Hamzat argues the court should have denied defendants' summary judgment motion because it was filed late. Code of Civil Procedure section 437c, subdivision (a)(3) requires that the motion "be heard no later than 30 days before the date of trial, *unless the court for good cause orders otherwise.*" (Italics added.) On January 2, 2018, "for good cause shown," the court granted defendants' ex parte application to have their motions heard on April 9, 2018 (28 days prior to the May 7, 2018 scheduled trial date). Hamzat has not demonstrated that he suffered any prejudice as a result of this discretionary ruling.

Second, he argues the court abused its discretion by allowing defendants to file a table of contents to their exhibits, asserting defendants' filing of the table of contents on March 21, 2018 violated Code of Civil Procedure section 437c, subdivision (a)(2) and California Rules of Court, rule 3.1350(g). There was no abuse of discretion. As the court explained in its order granting defendants' summary judgment motions: "The exhibits were not voluminous; Defendants filed a table of contents for the exhibits

as an ‘errata’ on [March 22, 2018], shortly after Plaintiff raised the issue; and Plaintiff has not shown that he was prejudiced in any way as a result of his belated receipt of the table of contents.” We agree.

Third, Hamzat inaccurately argues the proposed judgment was filed late. In fact, the court’s order granting defendants’ summary judgment motion directed defendants to serve and file a proposed judgment by April 18, 2018. Defendants served and filed the proposed judgment on April 11, 2018, as reflected by the court clerk’s stamp and the proof of service.

Fourth, Hamzat contends “defendants’ motion to compel was prematurely filed and the court granted it.” Hamzat has inadequately briefed this issue by failing to provide any analysis or any record references to the alleged motion and court order. (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) He has therefore waived the issue.

#### *Hamzat Has Not Shown the Existence of a Triable Issue of Material Fact*

A summary judgment motion is “granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) A material fact is a “fact that is necessary under the pleadings and, ultimately, the law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A triable issue of material fact exists if “the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850.)

“A defendant . . . has met . . . her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p)(2).)

An appellate court reviews “the trial court’s decision de novo.” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Here, the TAC alleges a single cause of action—defendants violated section 1983 when they abridged his First Amendment rights by alleging he violated the student code of conduct and expelling him “from school” because he said he “was treated unfairly because of the color of [his] skin and they would pay [him] back the money if [he] had to pay the \$20.”

Section 1983 “creates a cause of action against” a government official who “deprives another of rights guaranteed under the Constitution.” (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.) “In order for a person acting under color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation . . . .” (*Ibid.*; *Taylor v. List* (9th Cir. 1989) 880 F.2d 1040, 1045 [“Liability under section 1983 arises only upon a showing of personal participation by the defendant”].)

Spofford’s evidence showed she did not personally violate Hamzat’s First Amendment rights and Hamzat failed to show a triable issue as to this element of the claim. Spofford declared under penalty of perjury that she did *not* impose or recommend any sanction or adverse action against Hamzat for violating the student conduct code, and that she did *not* “direct that a hold be placed on Mr. Hamzat’s transcripts and academic records,” although a health services policy did provide “that a hold would be placed on a student’s transcripts and academic records if there was an outstanding balance due.”

Hamzat's declaration (the only evidence he offered in opposition to the motion) *did not even mention Spofford*, much less show her to be personally responsible for any sanction imposed against him. Hamzat did say, in his separate statement in opposition to the motion, that Spofford "was responsible for placing that hold . . . *prior* to August 16, 2016." (Italics added.) But that allegation was unsupported by any evidence. Moreover, even if that were true, a hold placed *before* the date of Hamzat's alleged protected speech did not violate his First Amendment rights.

Likewise, Rhoten's evidence showed she did not personally deprive Hamzat of his First Amendment rights and Hamzat similarly failed to show a triable issue as to this element of the claim. Rhoten declared under penalty of perjury that she did *not* "expel, or take any action adverse . . . to Mr. Hamzat because he said 'he was being treated unfairly because of the color of [his] skin, and that they will pay [him] back the money [he] paid to the school if [he] had to pay the \$20.00.'" Rather, she informed him by letter that he should schedule a meeting with her to discuss the complaint against him and to review the university student conduct code and that he could bring a nonattorney advisor. She subsequently informed him by a separate letter that a hold had been placed on his records because he failed to meet with her pursuant to executive order 1098.

In Hamzat's declaration in opposition to the motion, he acknowledged that the sanction against him was in response to his failure to meet with Rhoten at her request, *not* because of anything he had said on August 16. Hamzat declared: "I told Sandra Rhoten that I will not attend any meeting or hearing without, (1) My attorney, Or (2) Record our conversation at the meeting, Or (3) discuss the matter via email or telephone. Sandra Rhoten and California State University, Fullerton ignored this and placed a prolonged hold on my academic record, ignoring my rights." In his separate statement in opposition to the motion, Hamzat stated that Rhoten accused him of committing a crime on campus and denied him his due process right to have an attorney present at the meeting. But Hamzat did not present any evidence that Rhoten had accused him of

committing a crime on campus, and the TAC did *not* allege a due process violation. Furthermore, Hamzat failed to submit any evidence or legal authority that he had a due process right to have an attorney present at an initial meeting held pursuant to executive order 1098. (See, e.g., *Esteban v. Central Missouri State College* (8th Cir. 1969) 415 F.2d 1077, 1090 [“school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement”].)

On appeal Hamzat argues a material issue of disputed fact is (1) whether he failed to pay a \$20 cancellation fee, or whether the fee was actually for a “no show”; (2) whether he violated the student conduct code; and (3) whether two holds were placed on his academic record. The first two are immaterial. The fee was for Hamzat’s failure to cancel an appointment, not in retaliation for his exercise of a First Amendment right. Whether Hamzat actually violated the student conduct code is also immaterial; the salient fact is that he failed to attend a meeting to discuss the complaint that had been lodged. The third issue is undisputed, but still immaterial. The first hold was placed by health services prior to Hamzat’s August 16, 2016 conversation, while the second was placed by student conduct pursuant to executive order 1098 after Hamzat failed to meet with Rhoten. Neither was in retaliation for Hamzat’s August 16, 2016 conversation.

The court correctly determined there was no triable issue of material fact and that Spofford and Rhoten were entitled to judgment as a matter of law.

## DISPOSITION

The judgment is affirmed. Spofford and Rhoten shall recover their costs on appeal.

IKOLA, ACTING P. J.

WE CONCUR:

THOMPSON, J.

GOETHALS, J.